BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

In the Matter of	)	
	)	
Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

COMMENTS OF COMCAST CORPORATION

Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Its Attorneys

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SUMMARY

The Commission was granted broad discretion under the 1992 Cable Act to promulgate rules regulating the rates of cable operators. The Commission must utilize this discretion such that it does not inadvertently stifle growth or inhibit consumer choice. Therefore, the Commission should adopt a regulatory framework that:

- Rejects, to the fullest extent possible, all cost-of-service regulations. Cost-of-service regulations substantially add to administrative and compliance costs and diminish incentives for innovation and investment;
- Implements a benchmark approach for basic service tier regulation. The benchmark will be relatively simple to use and comports with Congress' goals. The benchmark approach would be adjusted over time using a suitable index;
- Subjects only the "bad actors" charging egregious rates to the complaint mechanism for cable programming services. A "bad actor" class would be identified by surveying the relevant prices on a per channel basis within system categories and thereafter creating a threshold at two standard deviations from the norm;
- Leaves video programming offered on a per-channel or per-program basis unregulated;
- Regulates equipment depending upon the category of service subscribed to. Basic-tier only subscribers would be directly regulated using a cost-based approach. Equipment used to receive cable programming services will be subject to the "bad actor" complaint mechanism;
- Sets a "maximum rate" for leased access channels that does not encourage migration or defeat the Act's goal of diversity;
- Implements the rate regulatory requirements in two phases. The first phase, which would be transitional, would begin on April 3, 1993. A permanent set of regulations would take effect on January 1, 1995. A transition period will allow cable operators to adjust to the Act's many requirements.

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INTRODUCTION

A. Background

Comcast Corporation submits these Comments in connection with the implementation of the price regulation requirements of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1]

Comcast Corporation is a diversified communications company with significant investments in the cable, cellular telephone, specialized mobile radio, and alternative access industries, among others. Comcast has major cable systems in the Philadelphia area and Baltimore County, Maryland, as well as extensive holdings in New Jersey, Michigan, Florida, California,

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[1] Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 92-544 (rel. Dec. 24, 1992) ("Notice").

Mississippi, Arkansas, Alabama, and Connecticut, among other places. Comcast has grown very substantially, principally by acquisition, over the last 10 years. Although in 1983 it had been in operation for twenty years, at that time, just prior to enactment of the Cable Communications Policy Act of 1984 ("1984 Cable Act") Comcast served fewer than 400,000 subscribers. Today it is the country's fourth largest cable television operator serving approximately 2.8 million customers.

Since its founding in 1963 by Ralph Roberts, Comcast has endeavored to maintain a reputation for superior reliable service while conducting its affairs in a fiscally prudent manner. Comcast's early slow growth curve is attributable in part to its deliberate decision to forego participation in the blue sky franchise auctions of the early 1980s. As a family-owned business, Comcast's orientation is to build long-term value rather than to concentrate on short term profits. This explains why Comcast has been neither a seller nor speculator in cable systems.

The company enthusiastically accepted the challenge laid down by Congress in 1984 to invest in the development of plant and programming which would make America's video delivery system of information and entertainment second to none. Since adoption of the 1984 Cable Act, Comcast has reinvested approximately three-quarters of a billion dollars in the form of capital improvements to its systems; provided millions in venture capital to pioneer new programming concepts such as E!, QVC and digital

cable radio, and helped to establish an industry-wide R&D facility, CableLabs.

Because its investments are made for the long term, Comcast strives to be the industry leader in customer service. Itsjudgment is that this element ranks as high with customers as either the technical features or programming offered by the system, and as is the case with other service industries, consumers will pay a relatively higher price for higher quality. Comcast has invested and expects to continue to invest substantial funds in the physical and human resources that comprise its systems to assure that they meet the corporation's commitment to quality.[2] Assuming the continuing validity of Comcast's "quality" philosophy, these investments over time will yield returns that justify the expenditures involved in both acquisition and upgrade of the systems. The question for the Commission is, does the 1992 Cable Act render this approach obsolete?

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[2] The company's emphasis on the quality of its cable service is reflected by an elaborate survey conducted each quarter for each of Comcast's 65 operating systems by a market research firm. The survey measures numerous dimensions of consumer satisfaction. For the most recent report aggregating a year's experience for all systems, 68 percent of Comcast customers gave the company a very high overall rating while only four percent gave it a very low rating. These results were roughly comparable to the local electric and telephone companies, which received very high overall ratings in the 74 percent range and very low ratings in the three percent range. Local government in Comcast's cable communities, incidentally, fares much worse. It achieves high overall ratings in the range of 27 percent and low overall ratings in the range of 17 percent.

There is nothing about the 1992 Cable Act that necessarily undermines Comcast's substantial and continuing investments in the cable industry and related telecommunications infrastructure. We believe it is possible to secure the cable industry performance improvements sought by Congress without repudiating Comcast's reasonable, investment-backed expectations and impairing the steady improvements in cable products and services Comcast's subscribers have come to expect. Considerable care must be taken, however, to avoid unintended consequences.

The rate regulation provisions in the 1992 Cable Act are not wholly straightforward. To make them workable -- to increase rather than reduce consumer welfare over the long term -- the Commission will be required both to resolve ambiguities and to supply missing terms. This is a familiar responsibility, but one made more difficult by the unusual context presented here. For the first time in many decades, Congress has imposed pricing controls on an industry largely free of such constraints. Moreover, the regulatory approaches Congress has specified are not wholly conventional. The Commission thus has both the responsibility and the opportunity to devise new forms of social controls on a large, growing, important American industry. It has the concomitant responsibility and opportunity to do so in a way that will not engender unnecessary dislocations for either cable subscribers or cable companies.

B. Introduction To Rate Regulatory Scheme

The Act defines three different categories of cable television programming and provides very different rate treatments for each. Section 623(b) of the Act regulates a "basic service tier" that must be made available to subscribers. The content of the basic service tier is left to the cable operator to determine but must include local television broadcast signals carried by the cable system, as well as public, educational and governmental access programming.[3] The Commission is instructed by the Act to promulgate regulations to "[e]nsure that the rates for the basic service tier are reasonable"[4] and do not exceed the rates that would be charged for the basic service tier if the cable system were subject to "[e]ffective competition."[5]

In contrast to the regulatory scheme which section 623(b) mandates for the basic service tier, section 623(c) provides for a fundamentally different, much less pervasive approach to "cable programming services." A "cable programming service" is any video programming other than (i) video programming which is on the basic service tier described above and (ii) video programming "[o]ffered on a "per channel or per program basis."[6] The

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[3] See Section 623(b)(7).

[4] Section 623(b)(1).

[5] Id.

[6] Section 623(l)(2).

definition of cable programming service also encompasses the installation and rental of equipment used for the receipt of any video programming which is a cable programming service.[7]

Cable programming services are not regulated under section 623(b). The Act does not require the Commission to prescribe reasonable rates for such services. Instead, section 623(c) instructs the Commission to establish criteria "[f]or identifying, in individual cases, rates for cable programming services that are unreasonable."[8] The Commission may then order reduction of rates for cable programming services it determines to be unreasonable upon a complaint from a subscriber or franchising authority.[9]

The distinction, then, between the basic service tier and cable programming services is very important. Rates for the basic service tier are subject to proactive regulation under section 623(b) to ensure their reasonableness. Rates for cable programming services are subject to reactive regulation under section 623(c) to reduce rates which are found upon complaint to be unreasonable. Finally, rates for video programming offered on a per channel or per program basis are not subject to regulation under the Act since such programming is not within the basic service tier and is excluded from the definition of cable

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[7] Id.

[8] Section 623(c)(1)(A) (emphasis added).

[9] See Section 623(c)(1)(C). The Commission is authorized to order refunds pursuant to this subsection.

programming services.[10] This distinction also is important. It does more than simply acknowledge the traditional lack of regulation of premium channels such as HBO and Showtime and pay-per-view events. It creates an inducement for cable operators to offer service on a per channel basis. This simultaneously enhances customer choice, increases competition among programmers, and alleviates some of the very real danger that rate regulation will retard the supply of desirable programming.

This statutory scheme is motivated by and reflects Congress' paramount concern that local television broadcast signals and public, educational, and governmental access programming be accessible to the greatest possible number of potential subscribers.[11] Congress rightly perceived that as a subscriber moves beyond the basic service tier to cable programming services and then to premium programming the governmental interest in assuring accessibility by regulating rates is limited in the first case and non-existent in the second.

The regulation of equipment rates under the Act likewise reflects this stratification of governmental interests. The cable rates and equipment of a subscriber receiving only the basic service tier are subject to proactive rate regulation under section 623(b). The cable rates and equipment of a subscriber who elects to purchase cable programming services are subject to

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[10] See Sections 623(b)(7) and 623(l)(2).

[11] 1992 Cable Act Sections 2(a)(17) and 2(a)(19).

the case-by-case reduction of "unreasonable" rates under section 623(c).

The regulation of leased access rates is markedly different than the regulatory approach for basic service, cable programming service, and equipment. Section 612 directs the Commission to "determine the maximum reasonable rates" for leased access. The Commission must take into account the potential problem of migration in establishing the correct "maximum reasonable rate." A "maximum reasonable rate" established on benchmark rates based on costs of typical cable systems, cost-of-service regulation, or reliance on the marketplace where effective competition exists will all lead to the migration of the programmers who are paying an implicit access fee that is higher than the leased access channel "maximum reasonable rate." This will surely not satisfy the goal of the section: "to promote the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are available to the public ..." Section 612(a). Instead, the Commission needs to adopt a "maximum reasonable rate" that will discourage migration -- a fee at or near the highest implicit access fees currently being charged for the "tier" on which the access programmer desires carriage. Cable operators will still have every incentive to negotiate fair rates, as they do now, with all prospective access programmers.

I. STANDARDS AND PROCEDURES FOR IDENTIFICATION OF CABLE SYSTEMS SUBJECT TO EFFECTIVE COMPETITION

The first question the Commission must answer in performing its implementation obligations is to determine which systems will be regulated under the new regime. It is important that the Commission make this determination not only with an eye on current market conditions, but with a view toward how, and how quickly, the world is changing. Dramatic and profound changes are occurring in the development and deployment of home video distribution alternatives. The attached paper by Mark Coblitz, Comcast's Vice President, Strategic Planning, describes some of the important technological developments that foreseeably will affect the cable television industry.[12] New institutional participants also are emerging in the forms of Hughes' and Hubbard's Direct Broadcast Satellite entries and Bell Atlantic's video dialtone proposals. And Congress has placed its confidence ultimately in the competitive marketplace. See Section 623(a)(2)("PREFERENCE FOR COMPETITION" and holding systems subject to effective competition safe from rate regulation).[13]

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[12] Coblitz, Technology Considerations, January 27, 1993 (Hereinafter "Coblitz"). Mr. Coblitz' paper addresses technological developments that involve increased bandwidth, digital implementation, increased processing power and storage, and system interconnection. Mr. Coblitz describes developments that are "either here today or will be available within an 18 month window for initial deployment. That is, there is almost no technological risk to what is described." Coblitz at 2.

[13] See also, Congress' policy of "rely[ing] on the marketplace, to the maximum extent feasible ... " 1992 Cable Act section 2(b)(2).

Thus, the implementation of the definitions of effective competition, and their application, should account for the changing nature of the video marketplace.

The Notice requests comment on a number of related issues surrounding the appropriate means by which it can be determined whether "effective competition" exists such that the affected system is not subject to rate regulation. Notice at ¶¶ 7-9. The Act itself provides the alternative tests to be applied; they are somewhat ambiguous in their precise implementation, however. In "filling out the details" the Commission should remain cognizant of the overriding purpose of the provisions: to identify the circumstances under which the perceived economic power of the cable system would be sufficiently constrained by competitive forces such that regulation and governmental intervention would be neither appropriate or desirable.

The statute provides that a cable system shall be determined to be subject to effective competition if any one of three tests is met. The first is a straightforward measure of penetration below 30%. The second two tests attempt to measure more directly the competitive constraints upon cable operators from other multichannel sources. Thus, under section 623(l)(1)(B), effective competition exists if 50% of the households in the franchise area are offered service by each of two multichannel distributors and 15% of the households are served by distributors other than the largest distributor. Under section 623(l)(1)(C), effective competition exists if there is a multichannel

distributor operated by the franchising authority which offers service to 50% or more of the households in the franchise area. In implementing these provisions, the Notice first questions how the term "offer" should be defined in determining whether alternative multichannel distributors are available to cable subscribers. The Notice proposes that such services be "actually available" in order to be counted. It further proposes to count "households" as any billable customer.

Under widely accepted economic analysis, competitive effects flow from both actual competitors currently in the market and those whose entry is sufficiently imminent to provide a competitive influence on the market even prior to entry. See United States v. Marine Bancorporation, 418 U.S. 602 (1974). Thus, a test which requires actual availability on a household by household basis would be inconsistent with longstanding economic learning. If, for example, a DBS operator is engaged in marketing in a local area, that activity should suffice since it is exerting actual competitive effects with respect to that franchise area. Especially given the fact that at least some of these multichannel distributors will be new entrants, their entry for purposes of implementing the Cable Act should not hinge on whether a particular consumer may be able to order the service on one particular day rather than another. So long as a distributor is technically capable (either in fact or with minimal investment) of selling to a particular franchise area, it should

be deemed to offer service to that entire area. Such an approach should be more easily administered as well.

The term "household" should be understood to mean what industry custom understands it to mean: television households as tracked by Arbitron.[14] The Commission already utilizes this term of art in its mass media ownership rules. See 47 C.F.R. § 73.3555(d)(3).

The Notice also questions which alternative suppliers of video programming should be counted. The examples provided in section 602(12), as cited in the Notice, plainly reveal Congress' intent to include virtually any source of multichannel programming. Plainly then, video dialtone, the telephone industry's much-promised "video-on-demand," multiplexed television broadcast signals, and leased access users should all be included because they offer subscribers the opportunity to view alternative programming.[15] Moreover, the Notice is correct in assessing that the penetration measure called for in the second test is satisfied by a cumulative accounting of any and

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[14] The geographic areas defined by Arbitron, of course, do not correspond with cable franchise areas. This is a complicating factor for some aspects of the implementation of the 1992 Cable Act.

[15] The Notice puts forth the view that if subscription to the basic tier is a requirement to the purchase of a leased access tier, then it should not be counted as an alternative. Comcast agrees with this interpretation.

all distributors other than the largest.[16] The percentage tests set forth in the statute are sufficiently demanding that if the 15% penetration is met on a cumulative basis, there is every reason to believe that the market is performing competitively. A market structure that fits the statutory definition by having only one competitor meet the percentage tests is not necessarily a "more competitive" structure than one which meets the test through the accumulation of smaller market shares.[17]

The Commission further questions whether its regulations should somehow attempt to measure quality of competition. The question answers itself; the government should not be in the business of deciding what programs or delivery systems are minimally satisfactory. The number of channels made available by a video distributor is in any event a meaningless measure in a "video-on-demand" environment. One channel may suffice to give consumers access to a broad array of programming, as the telephone industry's efforts to minimize the cable-telephone cross-ownership restrictions persistently advise. Similarly, the issue of "comparable" programming plainly should be decided by the marketplace, as the Notice proposes. There should in fact be an irrebuttable presumption of "comparability" for any "multichannel" provider, or else the statute risks governmental

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[16] Of course the availability measure must be met by each of two distributors offering service to 50% or more of the households in the local area.

[17] This, of course, is the implicit teaching of the Herfindahl-Hirschman Index employed by the antitrust authorities in assessing the competitive effects of mergers.

judgments in the quality of programming in contravention of the First Amendment.

Under current rules implementing the 1984 Act, local franchising authorities determine whether effective competition exists and, in the event of changes, whether that determination need be altered thereafter. Subject to the opportunity for de novo review by the Commission, the Notice's proposal to maintain this procedure appears sound. However, local determinations must be guided by the express federal policy favoring competitive market outcomes. Finally, the Commission must ensure that it has available all relevant data. It must therefore promulgate rules whereby multichannel distributors report availability and penetration numbers on a semi-annual basis.

II. BASIC SERVICE TIER REGULATION

A. Components Of The Basic Tier Subject To Regulation

1. Congress Encouraged, If Not Required, A Low-Cost Basic Tier Consisting Mainly Of Broadcast Stations

Congress, as part of its overall scheme to ensure reasonable rates for the basic tier, mandated that cable operators employ a low-priced basic tier consisting principally of broadcast signals ("skinny basic").[18] Indeed, the House was clear that "the purpose of section 3 is to create a tier of low cost basic cable service." H.R. Rep. No. 628, 102d Cong., 2d Sess. 83 (1992) ("House Report"). Congress wanted cable operators to create this tier because it found that broadcast stations are the most

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[18] See Section 623(b)(7).

popular programming carried on cable systems. The Act's findings state:

> Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or obtain improved signals.

1992 Cable Act section 2(a)(17).

Similarly, the House Report states:

> Local television stations are central to this public purpose -- they are both the leading source of news and public affairs information for a majority of Americans and the most popular entertainment medium.

House Report at 50.[19]

Congress left cable operators with discretion to decide whether or not to include additional programming on the low-priced basic tier.[20] However, if cable operators decide to put additional programming on the basic tier, Congress subjected it to the pervasive service rate regulation of section 623(b), thereby discouraging the addition of channels to the basic service:

> A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided at rates determined under the regulations prescribed by the Commission under this subsection.

Section 623(b)(7)(B).

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[19] See also, Senate Report at 35 (Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems, representing roughly two-thirds of the viewing time on the average system).

[20] Section 623(b)(7)(B).

If the additional channels, instead of being placed on the basic tier, were on an upper tier of programming, they would only be subject to the complaint mechanism of section 623(c) for unreasonable upper tier programming rates. The complaint mechanism is a less comprehensive regulatory scheme only intended to catch the bad actors charging egregious rates -- far less comprehensive than the basic service rate regulation scheme that incorporates local franchise regulation.

B. Regulation Of The Basic Service Tier By Local Franchising Authorities And The Commission

1. The Commission Has Limited Jurisdiction To Regulate Basic Service Rates

Comcast fully supports the Commission's tentative conclusion that it has only limited authority to directly regulate basic service rates. Notice at ¶ 15. The statute clearly provides that local franchising authorities have primary responsibility for administering basic rate regulation. Section 623(a)(2)(A) states, "[T]he rates for the provision of basic cable services shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6)." Section 623(a)(6) states, "the Commission shall exercise the franchising authority's regulatory jurisdiction ... [if] the Commission disapproves a franchising authority's certification ... or revokes such authority's jurisdiction."

The plain language of the provisions precludes the Commission from asserting regulatory jurisdiction whenever a

local franchising authority refrains from doing so. Therefore, the Commission's authority is strictly limited to those instances where the local franchising authority itself initially asserts jurisdiction and then fails to properly exercise that authority.[21]

This construction also makes sound policy sense. Local authorities are well positioned to judge whether or not subscribers are satisfied with basic cable rate levels. Furthermore, as the House and Senate Reports state, because only a minority of cable operators have priced basic service too aggressively, it is conceivable many franchise authorities will not see the need to regulate basic cable rates. Therefore, the Commission's sharply limited jurisdiction to regulate basic service is a practical response to what could be a staggering burden of nationwide basic rate regulation.

2. The Commission Cannot Grant Local Governments Authority Beyond That Which They Have Been Delegated Under Local Law

The Notice asks whether the powers of local governments to regulate rates can be derived solely from state or local laws, or whether the 1992 Act itself may grant such regulatory authority. Notice at ¶ 20.[22] The Commission must conclude that the 1992 Act

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[21] Even in this case, the Commission's jurisdiction is only on an interim basis until the franchising authority corrects its initial deficiency. See Section 623(a)(4).

[22] Additionally, the Notice asks whether exercise by the Commission "of basic service rate regulation authority pursuant to Section 623(a)(6) in a state prohibiting rate regulation by (continued...)

does not grant authority to local governments beyond that which they have been delegated under state law. This conclusion is a function of the Tenth Amendment to the Constitution.

It is a general principle that local governments are creatures of state law. As products of the state, municipalities do not possess inherently the power to grant franchises or to regulate. 3 Chester James Antineau, Municipal Corporation Law § 29.02 (1992) ("Antineau"), see also, 1 Ferris, Lloyd, Casey, Cable Television Law § 13.14-15 (1992). Rather, the powers to franchise and to regulate are state powers which can be extended to municipalities only through an express grant or as an implied product of an express delegation of authority. Antineau, § 29.02. Such grant of authority generally is found in state statute or constitutional provisions, or in the terms of local government charters. Id. Absent such grant, a local franchising authority cannot regulate cable rates. The federal government

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[22](...continued)
local authorities would in fact constitute preemption of state law." Notice at ¶ 20. Section 623(a)(3) does not preempt state law which prohibits local authorities to rate regulate. The Act neither mandates that local authorities be granted power to regulate, nor independently empowers local authorities to rate regulate. Rather, such power may only be granted to the franchising authority by the state. Thus, in a state that prohibits rate regulation by local authorities, Section 623(a)(6) simply extends to the Commission that which the local franchising body has, namely, a rate regulation prohibition. Since the Commission will not have any rights other than those conferred under state law, the state law will not be inconsistent with the Act, and thus preemption will not occur.

cannot bestow upon the cities what the states have chosen to deny to them.[23]

3. Certification Process Should Be Simple

Comcast supports the proposal for a simple certification process including the proposed form on Appendix D of the Notice. Items 3 through 5 on the proposed form reflect the core issues of the franchisor's legal and practical ability to regulate basic rates in the public interest. The instructions concerning these items must emphasize the franchisor's obligation to respond in good faith. The Commission also should require the franchise authority to serve the cable operator with the certification no later than the same day as filing. This will ensure a reasonable time to review the certification. In addition, the Commission should concede that with tens of thousands of cable communities nationwide, it is unlikely the Commission will be able to judge properly the certifications within the 30 days required by the Act. Therefore, the Commission should reserve the right to revoke the franchise authority's jurisdiction, through the petition of a cable operator, on the basis of a defective certification after the 30 days have run.

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[23] See also, Amendment of Rules Regarding Regulation of Cable Television System Regular Subscriber Rates, 57 F.C.C. 2d 368, 369 (1976). ("[R]ules do not, and can not give authority to franchising bodies when that authority does not exist under State law. Rather, [its] rules and guidelines only apply when and if the authority is exercised pursuant to existing powers.")

C. Implementation and Enforcement

Comcast believes that it is difficult to recommend specific implementation and enforcement procedures before knowing the method the Commission will adopt for basic service rate regulation. However, whatever method the Commission embraces, it should promulgate implementation and enforcement procedures that are clear and readily adoptable by all local franchise authorities, regardless of their size. Clarity will also benefit the Commission, cable operators and other parties with standing.

The Notice asks what time frame is appropriate for local franchise authorities to review and render a decision on a rate increase. Notice at ¶¶ 80-83. Comcast recognizes that the 30 day advance notice requirement in Section 623(b)(6) of any "increase proposed in the price to be charged for basic service tier" is not enough time for local franchise authorities to review the increase, consider pleadings, and render a decision. Therefore, the Commission should grant the local franchise authorities an additional thirty (30) days to the 30 day advance notice requirement, for a total of sixty (60) days from the initial notification, in order to render a decision.[24]

The Notice asks whether a franchising authority has the power under the Cable Act, if it denies a rate increase, to set a rate for basic cable service itself. Notice at ¶ 86. Government

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[24] Having sought this responsibility, local franchise authorities should be expected to carry out their duties expeditiously. As long as the Commission adopts a benchmark approach for basic service rate regulation, 60 days should be sufficient time to render a decision.